HII HIENG LEE

v.

TIMBALAN MENTERI DALAM NEGERI MALAYSIA & ORS

HIGH COURT MALAYA, JOHOR BAHRU
AZAHAR MOHAMED JC
[CRIMINAL CASE NO: 44-12-2004(4)]
1 SEPTEMBER 2004

PREVENTIVE DETENTION: *Detention - Detention exceeding three months - Advisory board failing to make recommendations to Yang di-Pertuan Agong within the three months - Whether detention rendered unlawful - Federal Constitution, arts. 5(1), 151(1)(b) - Emergency (Public Order and Prevention of Crimes) Ordinance 1969, ss. 6, 7C, 7D - Habeas corpus*

CONSTITUTIONAL LAW: *Fundamental liberties - Habeas corpus - Preventive detention - Detention exceeding three months - Advisory board failing to make recommendations to Yang di-Pertuan Agong within the three months - Whether detention rendered unlawful - Federal Constitution, arts. 5(1), 151(1)(b) - Emergency (Public Order and Prevention of Crimes) Ordinance 1969, ss. 6, 7C, 7D*

ADMINISTRATIVE LAW: *Remedies - Habeas corpus - Preventive detention - Detention exceeding three months - Advisory board failing to make recommendations to Yang di-Pertuan Agong within the three months - Whether detention rendered unlawful - Federal Constitution, arts. 5(1), 151(1)(b) - Emergency (Public Order and Prevention of Crimes) Ordinance 1969, ss. 6, 7C, 7D*

This was an application for a writ of *habeas corpus* grounded on violations of art. 151(1)(b) of the Federal Constitution ('Constitution') and s. 6 of the Emergency (Public Order and Prevention of Crimes) Ordinance 1969 ('Ordinance'). It was contended on behalf of the applicant detainee that the failure of the advisory board to make recommendations to the Yang di-Pertuan Agong within the prescribed time as required by the said provisions had rendered the continued detention of the applicant unlawful.

Held (allowing the application):

[1] Article 151(1)(b) of the Constitution is plain and unambiguous. It states expressly that a person may not be detained for a period exceeding three months unless within that period the advisory board has made recommendations to the Yang di-Pertuan Agong. This requirement is fundamental and a condition precedent for the continued detention of a detainee. As the applicant's complaint clearly touched on the procedural requirements of the detention, the failure to comply with them was amenable to judicial review by virtue of s. 7C of the Ordinance. Further s. 7D of the Ordinance provides that judicial review includes a writ of *habeas corpus*. In the present case, there was no evidence to show that the advisory board had made recommendations to the Yang di-Pertuan Agong as required by art. 151(1)(b) of the Constitution and s. 6 of the Ordinance. The Minister's affidavit merely stated that the Minister had received representations from the advisory board. Therefore, there was a violation of art. 151(1)(b) of the Constitution and s. 6 of the Ordinance. Article 5(1) of the Constitution guarantees that a person's personal liberty is not to be deprived save in accordance with law. It followed that the continued detention of the applicant was unlawful since it was not in accordance with the law. (pp 526 d-h & 527 a-b)

Case(s) referred to:
Re Tan Boon Liat et al [1977] 2 MLJ 108 ***(foll)***

Legislation referred to:
Emergency (Public Order and Prevention of Crimes) Ordinance 1969, ss. 6, 7C, 7D
Federal Constitution, arts. 5(1), 151(1)(b)

For the applicant - RR Mahendran; M/s RR Mahendran & Co
For the respondent - Abdul Rani Megat Kasim SFC

Reported by Usha Thiagarajah

JUDGMENT

Azahar Mohamed JC:
This application for a writ of *habeas corpus* raises important constitutional issues. The issues bring into focus the questions whether or not there had been violations of arts. 151(1)(b) and 5(1) of the Federal Constitution ('the Constitution'). It also raises the question whether or not there had been non-compliance with the requirements of s. 6 of the Emergency (Public Order

and Prevention of Crimes) Ordinance 1969 ('the Ordinance'). To put the matter in perspective, I consider it useful to reproduce immediately the following provisions.

Articles 151(1)(b) of the Constitution reads as follows:

> 151(1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention:
>
> ....
>
> (b) no citizen shall continue to be detained under that law or ordinance unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph (a) **and made recommendations thereon to the Yang di-Pertuan Agong** within three months of receiving such representations, or within such longer period as the Yang di-Pertuan Agong may allow. (emphasis added)

Article 5(1) of the Constitution provides that:

> No person shall be deprived of his life or personal liberty save in accordance with law.

Section 6 of the Ordinance enacts:

> (1) Whenever any person has made any representations under section 5(1) to an Advisory Board the Advisory Board, shall within three months from the date on which such representations were received by the Advisory Board, or such longer period as the Yang di-Pertuan Agong may allow, consider such representations **and make recommendations thereon to the Yang di-Pertuan Agong.**
>
> (2) **Upon considering the recommendations of the Advisory Board under** this section the Yang di-Pertuan Agong may give the Minister such direction, if any, as he shall think fit regarding the order made by the Minister and every decision of the Yang di-Pertuan Agong thereon shall subject to the provisions of section 7 be final and shall not be called into question in any Court. (emphasis added)

The factual background against which the issues arises needs to be briefly stated in order to understand the perspectives. The facts were quite simple and straightforward. The applicant is the subject of a detention order dated 16 April 2003 made by the Minister of Home Affairs pursuant to s. 4(1) of the Ordinance whereby he was ordered to be detained for a period of two years at the Pusat Pemulihan Akhlak, Simpang Rengam, Johor commencing 17 April 2003. The impugned order was in the following terms:

BAHAWASANYA saya, berpuashati yang Perintah Tahanan adalah perlu dibuat ke atas orang yang namanya tersebut di bawah ini dengan tujuan:

(c) mencegah jenayah melibatkan kekerasan *

Nama	No. Kad Pengenalan
HII HIENG LEE	730702-13-6303

MAKA, OLEH YANG DEMIKIAN, pada menjalankan kuasa yang diberi di bawah Seksyen 4(1), Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969, saya dengan ini memerintahkan supaya orang yang namanya yang tersebut di atas ditahan selama dua (2) tahun mulai dari 17 haribulan April 2003 di Pusat Pemulilian Akhlak, Simpang Rengam, Johor atau di mana-mana tempat lain sebagaimana yang diarah dari semasa ke semasa.

Diperbuat pada 16 haribulan April 2003

(DATO' CHOR CHEE HEUNG)
TIMBALAN MENTERI DALAM NEGERI
MALAYSIA

The applicant seeks to be released from detention as prayed for in the notice of motion dated 10 April 2004 which is supported by the affidavit of the applicant affirmed on 12 April 2004. The affidavit had stated numerous grounds for challenging the ministerial order. However at the commencement of the hearing of this application, learned counsel for the applicant informed the court that the applicant had decided to proceed with only one issue and that was in respect of the alleged breach of applicant's constitutional right under art. 151(1)(b) and the contravention of s. 6 of the Ordinance. In order to appreciate the arguments of the learned counsel, it is necessary to reproduce the relevant paragraph of the applicant's affidavit which reads as follows:

11) Saya sesungguhnya percaya bahawa tiada pertimbangan dan rekomendasi yang dibuat oleh Lembaga Penasihat kepada Yang di-Pertuan Agong sepertimana diperuntukan dalam Seksyen 6 Ordinan Tersebut.

It was the contention of learned counsel that the failure of the Advisory Board to make recommendations to the Yang di-Pertuan Agong as required by the Constitution and the Ordinance within the prescribed time renders the continued detention of the applicant to be unlawful.

In resisting the application the learned senior federal counsel on behalf of respondents referred to para. 8 of the affidavit of the Minister, which was affirmed on 23 August 2004, which reads:

> 8. Merujuk kepada perenggan-perenggan 10 dan 11 afidavit Permohon, saya sesungguhnya menyatakan bahawa saya telah menerima satu laporan bertulis mengenai Representasi daripada Lembaga Penasihat pada 7.7.2003 di bawah Seksyen 6(1) dan Lembaga Penasihat telah melaporkan pada pendapatnya bahawa Pengataan Fakta adalah berasas setelah bicara diadakan. Saya tidak dapat mengemukakan laporan tersebut kerana saya berpendapat ianya bertentangan dengan kepentingan negara.

The learned senior federal counsel whilst conceding that the affidavit did not expressly state that the Advisory Board had made recommendation to Yang di-Pertuan Agong, submitted that the omission was not fatal and did not affect the continued detention of the applicant and therefore the application should be dismissed.

I now turn to consider the merit of the application. In my view the present application is already covered by the decision of the Federal Court in *Re Tan Boon Liat @ Allen & Anor. et al* [1977] 2 MLJ 108. The decision is well summarized at p. 108:

> (1) reading Article 151(1)(b) of the Federal Constitution and section 6 of the Emergency (Public Order and Prevention of Crimes) Ordinance, 1969, the only reasonable conclusion is that a citizen cannot be detained for more than three months from the order of detention unless (a) the Advisory Board considers the representations of the detainees and makes recommendations thereon to the Yang di-Pertuan Agong within three months from the detention order and (b) the Yang di-Pertuan Agong confirms the order of detention after considering the recommendations;
>
> (2) the failure of the Advisory Board to carry out its duty within the prescribed time in these cases rendered the continued detention after the three month period to be unlawful as it could not be said to be in accordance with law;

In this regard I find a passage in the judgment of Suffian LP in *Re Tan Boon Liat*'s case to be of direct relevance to the case. This is what Sufian LP says at p. 109 of the report:

> I drew a distinction between law and procedure and said in effect that the courts will take a serious view of failure to comply with substantive law but not of failure to comply with procedural law. But here the provision breached is not just procedural, but in my opinion substantive. In Karam Singh after the order of detention had been made against him, the Minister was required to do certain things, which Mr. Karam Singh complained the Minister had not done. Here, on the other hand, the condition for the detention of the appellants after the period of three months is fundamental; that condition had to be satisfied before the order could be made; it was a condition precedent. Before the appellants could be further detained beyond three months the Board must have made recommendations on their representations. That condition precedent has not been satisfied and in my judgment their continued detention after that period was herefore unlawful, since it was not, in the words of Article 5(1), "in accordance with law".

The framers of our Constitution by art. 151 expressly provide for a safeguard for a detainee. It says in cl. (1)(b) that any detention after the period of three months is subject to two conditions:

> (1) that the advisory board considered the representation of the detainee and make recommendations thereon to the Yang di-Pertuan Agong within three months from the date of the detention order, and
>
> (2) the Yang di-Pertuan Agong confirmed the order of the detention.

The language of the provision of the Constitution is plain and unambiguous and it expressly states that a person may not be detained for a period exceeding three months unless within the period the Advisory Board has made recommendations to the Yang di-Pertuan Agong. This requirement is fundamental and a condition precedent for continued detention of a detainee. Under our Constitution a detainee cannot be detained longer than three months unless the Advisory Board constituted in accordance with the Constitution makes the necessary recommendations to the Yang di-Pertuan Agong. It is important to bear in mind and to note that the original art. 151(1)(b) reads as follow:

> (b) no citizen shall be detained under the law or ordinance for a period exceeding three months unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph (a) and has reported, before the expiration of the period, that there is in its opinion sufficient cause for the detention.

Act 10/1960, s. 30, in force from 31 May 1960, substituted the original paragraph (b) with the following:

> (b) no citizen shall be detained under the law or ordinance for a period exceeding three months unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph (a) **and made recommendations thereon to the Yang di-Pertuan Agong**. (emphasis added)

The new art. 151(1)(b) requires the Advisory Board to make recommendations on the detainee's representation to the Yang di-Pertuan Agong. Thus, while previously it was envisaged that the Advisory Board would have the final say in preventive detention, Parliament decided that it would be the Yang di-Pertuan Agong who now have the final say.

The next point is this. In the present case the applicant's complaint clearly touches on the procedural requirements of the detention. This brings me to s. 7C of the Ordinance which provides:

> (1) There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Ordinance, **save in regard to any question on compliance with any procedural requirement** in this Ordinance governing such act or decision. (emphasis added)

Section 7D of the Ordinance, *inter alia*, provides that 'judicial review' as stated in the abovementioned section includes a writ of *habeas corpus*. Section 7C does not exclude judicial review generally, and a writ of *habeas corpus*, in particular in respect of non-compliance of procedural requirements. Thus the non-compliance with the fundamental procedural requirements of s. 6 of the Ordinance and art. 151(1)(b) of the Constitution is amenable to judicial review and this includes the issuance of the writ of *habeas corpus*.

With that, I return to the affidavit of the Minister. I am satisfied from a careful scrutiny of the affidavit that there is no evidence to show the Advisory Board has made recommendations to the Yang di-Pertuan Agong as required by art. 151(1)(b) of the Constitution and also s. 6 of the Ordinance. Paragraph 8 of the Minister's affidavit merely states that the Minister had received representation from the Advisory Board. In my judgment on the facts of the present case there had been violations of art. 151(1)(b) of the Constitution as well as s. 6 of the Ordinance. Article

5(1) of the Constitution speaks of 'personal liberty'. It guarantees that a person's personal liberty is not to be deprived save in accordance with law. Article 151(1)(b) and s. 6 of the Ordinance set out the time frame and procedure that must be adhered to for the curtailment of the liberty of a person detainee under the preventive detention laws. In the result the continued detention of the applicant was unlawful, since it was not, in the words of art. 5(1) of the Constitution, 'in accordance with law'. For the reasons I have given I would allow the applicant's application for a writ of *habeas corpus* and the applicant be set at liberty.